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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD ANTHONY CRUZ, Defendant and Appellant.	E046608 (Super.Ct.No. SWF023375) **OPINION**

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge. Affirmed.

Wilson Adam Schooley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, Sharon L. Rhodes, and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

On November 27, 2007, defendant Edward Anthony Cruz was stopped in Temecula by a Riverside County sheriff's deputy based on a reported call of domestic violence. It was discovered that defendant had failed to register as a sex offender in Riverside County despite having lived in Temecula for at least the prior two weeks and having prior sexual offenses that subjected him to lifetime registration. He had also not advised law enforcement officials in Los Angeles County, where he had previously resided, that he had moved to Riverside County.

Defendant was found guilty of two counts of failing to register and deregister as a sex offender. In addition, he was found to have suffered three prior serious or violent felony convictions; the trial court, however, struck two of the prior convictions at sentencing. He contends on appeal:

1. The prosecutor improperly advised the jurors that defendant had suffered a prior conviction involving oral copulation of child under the age of 14.

2. The prosecutor committed prosecutorial misconduct requiring reversal of the verdict.

3. The trial court erred in denying defendant's motion to suppress statements elicited from him just prior to his arrest absent any *Miranda*[1] advisements.

4. The trial court improperly invaded the deliberative process by inappropriately responding to juror questions during deliberations, conducting inquiries

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436, 474 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*).

of the jury to determine whether misconduct occurred, and ordering deliberations resumed after the jury complained they were deadlocked.

5. Cumulative error mandates reversal.

We conclude there were no prejudicial trial errors and affirm the judgment.

I

PROCEDURAL BACKGROUND

In a felony complaint filed on November 29, 2007, defendant was charged with two counts of failing to register within five days of changing residences within the meaning of Penal Code section 290, subdivision (a)(1).[2] It was further alleged that he had suffered one prior serious or violent felony conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)). On February 27, 2008, defendant pleaded guilty to the court to the charges. Defendant was to be sentenced on April 10, 2008.

A first amended complaint was then filed by the Riverside County District Attorney's Office, which alleged that defendant had suffered two additional prior serious or violent felony convictions. Defendant subsequently withdrew his guilty plea.

Defendant was found guilty by the jury of failing to deregister as a sex offender in Los Angeles County and failing to register in Riverside County. In a bifurcated proceeding, after defendant waived his right to a jury trial on the prior convictions, the trial court found all three of the prior serious or violent felony convictions true. At

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

sentencing, the trial court struck two of the prior felony convictions under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

Defendant was sentenced to eight years in state prison.

II

FACTUAL BACKGROUND

Diane Brannigan was the on-site manager at the Indian Oaks Trailer Ranch in Temecula. She had both short-term campers and long-term guests.

In October 2007, Brannigan was contacted by defendant, who wanted to rent a space for one or two months. A background and credit check was required for long-term residents. When defendant came to the park, he told Brannigan he and his girlfriend intended to stay two or more months but did not fill out information for a background check. On November 8, 2007, defendant parked a travel trailer in the space he had rented. He had not moved out of the space prior to November 27, 2007. Brannigan had invoices for rent and utilities bearing defendant's name.

Residents and workers at the Indian Oaks Trailer Ranch saw defendant in his trailer and around the campground on a regular basis. He appeared to be living in the trailer, as he was there in the early morning and late at night.

Riverside County Sheriff's Deputy Daniel Hernandez worked in Temecula. On November 27, 2007, he was on patrol and received a call of potential domestic violence at the Indian Oaks Trailer Ranch, along with a description of the truck the suspect was driving. Deputy Hernandez saw the truck and contacted defendant, who was driving the

truck. Defendant told Deputy Hernandez that he had been living at the Indian Oaks Trailer Ranch for a "few weeks."

Matthew Remmers was a senior investigator with the Riverside County District Attorney's Office in charge of tracking and monitoring sex offenders in Riverside County. He explained that a person who is subject to lifetime registration as a sex offender is required to register within five days of his birthdate every year. In addition, if such a person moves, he must notify the law enforcement authorities in the new location of his address and also inform the law enforcement agency in his old location that he no longer lived in the area. Remmers relied on records from the Violent Criminal Information Network (VCIN) to track sex offenders.

On November 27, 2007, Remmers was on duty and monitoring the police radio. Based on that monitoring, he responded to the area where defendant had been detained by Deputy Hernandez.

According to the VCIN records, defendant had failed to register as required on his birthday from 1996 through 2001. He also had received notification on several occasions that he had a lifetime requirement of registration. The Department of Motor Vehicles listed defendant's address from 2003 through mid-August of 2007 as 11022 Arlee Avenue in Norwalk.

The last time that defendant had properly registered was October 22, 2001, in Bullhead City, Arizona. On October 19, 2001, defendant was stopped by a patrol officer there, and the officer discovered he was not registered as a sex offender. Defendant

admitted to the officer that he was required to register in Los Angeles County. Defendant admitted to having lived in Bullhead City for several months. He was given full advisements of his duty to register as a sex offender in whichever state he resided. Defendant did not advise authorities in Arizona when he moved back to California.

Documents provided by the Riverside County Sheriff's Department showed that defendant had never registered with local law enforcement in Riverside County, including Temecula. Documents provided by the Los Angeles County Sheriff's Department showed that defendant had never registered with local law enforcement in Los Angeles County, including Norwalk.

The jury was also shown documents that defendant had previous convictions for violating sections 261, subdivision (2) (forcible rape) and 288a, subdivision (c) (forcible oral copulation), which both required mandatory lifetime registration.

A bifurcated trial on the prior convictions was conducted. Fingerprints taken from the defendant matched the record of conviction for the three alleged prior serious or violent felony convictions.

III

ADMISSION OF PRIOR CONVICTION INVOLVING ORAL COPULATION WITH A PERSON UNDER THE AGE OF 14

Defendant contends that the "district attorney repeatedly waived [*sic*] in front of the jury like a red cape an inaccurate and inflammatory prior conviction she knew or had

reason to know" defendant had not suffered. (Capitalization omitted.) Such admission caused irrevocable prejudice requiring reversal.

A. *Additional Factual Background*

Prior to trial, the parties agreed to stipulate that the jury would be informed that defendant had suffered two prior felony sex offenses that imposed upon him a lifetime requirement of registering as a sex offender without hearing the details of the prior convictions.

Thereafter, defendant noted that the information included that the oral copulation was either by force or with a person under the age of 14, but the abstract of judgment made it clear that he was convicted of oral copulation by force. The prosecutor advised the trial court that there was no police report with the prior, so she was not sure of the true nature of the conviction. She acknowledged the abstract of judgment and prior prison packet from the case notated that it was a conviction for oral copulation by force. The prosecutor did not object to crossing out the statement on the information.

On the day of opening statements, defendant objected for the first time to the stipulation on the prior convictions because it made it appear that the convictions occurred on separate occasions when in fact they were all one case. The stipulation was withdrawn, and the People were advised by the trial court to present evidence to support the prior convictions to show defendant had a duty to register. The People argued that it could present the certified prior documents, including the VCIN document that stated that the prior conviction for oral copulation was either suffered because the victim was under

the age of 14 or because it was accomplished by the use of force. The prosecution had not brought the other documents regarding the prior conviction because she had not brought the priors packets, thinking she did not have to prove the prior convictions. The People could not change the certified documents.

The trial court advised defense counsel that she could be hurting her client by refusing to enter into the stipulation. It agreed it could not edit the VCIN, as it was a certified document. The prosecutor indicated that if defendant refused the stipulation, the certified prior as it was unredacted would come in. The trial court did not disagree.

The prosecutor asked the trial court to instruct the jurors prior to opening statements that they would now be hearing about the priors since they had previously been told during voir dire they would not be told about the priors. Just prior to opening argument by the People, the jury was instructed that despite the fact they had been instructed that they would not hear about the priors, they would now be informed of the priors.

In their opening statement, the People advised the jurors that the evidence would show that defendant had suffered two prior sex offenses that required him to register as a sex offender, including oral copulation by either force with the use of a knife or with a person under the age of 14. Later in the case, when the certified prior documents were admitted, they showed the oral copulation as being by use of force.

On July 18, 2008, defendant brought a motion for mistrial for the prosecutor mentioning the prior conviction could involve a minor under the age of 14 when she

knew it was not true. The prosecutor contended that, since she did not have the police reports, she could not be certain the age of the victim. Defendant argued that the prosecutor was well aware this did not involve a minor 14 or under and that the prosecutor deliberately and intentionally advised the jurors that the victim was under the age of 14. The prosecutor denied this allegation.

The trial court, after reviewing the documents, agreed with defendant that "the jury was given false information or incorrect information." The prosecutor felt that the description on the VCIN was more accurate. Without the police report, she could not be sure whether or not the victim was 14 or under. The trial court denied the motion for mistrial, agreeing it could not know for sure what occurred in the prior. If it came to light that in fact the victim was not under 14, the issue would be revisited.

During Remmers's testimony, the prosecutor put on the overhead the VCIN document that included the statement that the oral copulation could have involved a minor under the age of 14. Defendant again asked for a mistrial. The trial court stated that it was "taken aback" when she showed the statement of the charges to the jurors and that if it was shown that the charge did not involve a minor, the jurors would have to be admonished. The trial court advised the prosecutor, " . . . I think that you're jeopardizing your case by showing them this information before we get this whole thing cleared up. I think the case is still saveable, but it's becoming more difficult for the Court." The prosecutor responded that the court never advised her that the VCIN could not be shown, and the charges were not highlighted. The trial court stated, "[P]lease don't disrespect

me. The convictions were right in the middle of that piece of paper and it was highlighted." The trial court still felt that, if it turned out the crime was rape by force, a jury instruction would fix the problem. The trial court admonished the prosecutor to be careful what documents she showed to the jury until the issue was resolved.

Later in the case, the prosecutor notified the trial court she did not know how she could prove the victim in the prior case was not under the age of 14 because the police reports were purged. The only way that defendant could prove it was by testifying. The court suggested defendant draft a jury instruction pertaining to the "either/or" nature of the charge. It then stated that it was "leaning" toward the determination that the prior conviction only involved oral copulation by use of force and did not involve a minor based on the certified prior documents. The prosecutor still stated that she had no way of knowing the true nature of the prior conviction.

At the time the prosecutor sought to admit the exhibits, defendant asked that the VCIN document (which was being introduced to show the admonitions to defendant to register and the dates he failed to register) be redacted to exclude the statement about the oral copulation possibly involving a minor under the age of 14. The prosecutor argued that the certified document could not be altered. The trial court agreed the document should be introduced as it appeared and should not be redacted.

The trial court instructed the jury, "You have heard and seen evidence in People's Exhibit Number 3 pertaining to the VCIN or V-C-I-N document. The Court has received

People's Exhibit Number 4, a certified copy of prior convictions. Neither of these exhibits reflect or indicate the age of the victim."

During closing argument, the prosecutor argued that defendant's previous convictions for forcible copulation and rape qualified him to register as a sex offender. The prosecutor also admonished the jurors that it was irrelevant what the facts of the priors were; all that mattered was that he had the convictions that qualified him for registering as a sex offender. The prosecutor relied on the VCIN to show that defendant had previously been advised that he had to register as a sex offender.

Defendant's counsel argued during his closing that the documents did not support that the prior convictions involved a minor under the age of 14. The prosecutor reiterated in her rebuttal argument that the age of the victim in the prior convictions was completely irrelevant.

B. *Analysis*

Defendant complains that the prosecutor committed misconduct by showing the jury during opening argument and cross-examination of Remmers the VCIN document that listed the prior oral copulation conviction as involving either the use of force or committed against a person under the age of 14. (See § 288a, subds. (c)(1) & (c)(2).) Defendant also appears to contend that the trial court erroneously failed to alter the certified document to exclude the reference to oral copulation on a minor. Defendant contends the admission of information on VCIN document resulted in irrevocable prejudice.

A prosecutor's conduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) A prosecutor's comments are misconduct under the United States Constitution "when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) To establish prosecutorial misconduct, a defendant need not show that the prosecutor acted in bad faith, but he must show that his right to a fair trial was prejudiced. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35.) "In either case, only misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm. [Citation.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

Initially, we do not agree with defendant that the prior as listed on the VCIN was indisputably incorrect, since it was proven that the prior conviction for oral copulation was by use of force and not on a minor under the age of 14. The parties do not dispute that the police report for the prior conviction was not available. Defendant relies on a statement made by defense counsel during his motion for new trial that his investigator had searched the prior records and determined the birthdate of defendant's victim in the prior conviction, and she was 17 years old at the time of the conviction. It certainly could be inferred from the surrounding documents, which showed the prior as oral copulation by force, that the prior conviction did not involve a minor, but we cannot accuse the prosecutor of reprehensible conduct when it has not been shown unequivocally that the VCIN was incorrect. Traditionally, a violation of section 288a is described as *either* by

force or on a person under the age of 14. (See e.g., *People v. Carmony* (2004) 33 Cal.4th 367, 371.) The VCIN certainly is not patently erroneous so as to fault the prosecutor for seeking to admit the document.

Defendant withdrew his stipulation to the prior convictions just prior to the beginning of the case. Under section 290, the People had to prove that defendant had failed to register within five days of moving his residence as required by subdivision (b). The People also had to prove that defendant had a mandatory lifetime registration requirement under section 290, subdivision (c). Under section 290, the People also had to show that defendant had knowledge of his requirement to register as a sex offender. (*People v. Garcia* (2001) 25 Cal.4th 744, 752.)

The evidence contained in the VCIN included admonishments defendant received that he must register as a sex offender when moving. Further, it contained information that defendant had suffered two qualifying sexual offenses that subjected him to mandatory registration. That this document also contained potentially prejudicial, but not knowingly false, information is not a basis upon which we can find fault on the part of the prosecutor for seeking its admission or the trial court for allowing its admission.

Regardless of whether or not the prosecutor committed misconduct by presenting the VCIN document to the jury, or the trial court erred by admitting the document at trial, we find that no reversible error occurred.

"Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such '"unfairness as to make the resulting conviction a

denial of due process."' [Citation.] By contrast, our state law requires reversal when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' [citation] and '"it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct"' [citation]." (*People v. Davis* (2009) 46 Cal.4th 539, 612.) Moreover, the erroneous admission of evidence is prejudicial only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 194.)

The jury was instructed by the trial court, "You have heard and seen evidence in People's Exhibit Number 3 pertaining to the VCIN or V-C-I-N document. The Court has received People's Exhibit Number 4, a certified copy of prior convictions. Neither of these exhibits reflect or indicate the age of the victim."

During closing argument, the prosecutor argued that defendant had previous convictions for forcible oral copulation and rape that qualified him to register as a sex offender. The prosecutor also admonished the jurors that it was irrelevant what the facts of the priors were; all that mattered was that he had the convictions that qualified him for registering as a sex offender. The prosecutor reiterated in her rebuttal argument that the age of the victim in the prior conviction for oral copulation was completely irrelevant. Defendant's counsel argued during his closing that the documents did not support that the prior conviction involved a minor under the age of 14.

Based on the foregoing, we cannot conclude that the information so infected the trial as to require reversal. The jury was well informed on the prior convictions. Further, this is not a case where this was the only evidence of defendant's abhorrent behavior. The jury was informed that defendant had a mandatory lifetime registration requirement. They were aware that he had kidnapped his victim and committed forcible rape. At the very least, they were properly informed that defendant had committed oral copulation by force. Although the evidence of oral copulation of a minor is certainly a heinous crime that could evoke an emotional response from the jury, the jury certainly could have been equally as upset by the fact defendant had kidnapped his victim, raped her, and used a knife to force her to commit oral copulation. The complained-of evidence in this particular case was not so egregious as to have prejudiced defendant in light of the instructions by the trial court, the argument by counsel, and the fact it was already properly in front of the jury that defendant had committed several prior sex offenses.

Additionally, although the jury was initially deadlocked, it did reach a verdict. The evidence supporting the verdict was strong. There is no doubt defendant was required to register as a sex offender and that he failed to do so, as that issue was not really in dispute. There was strong evidence that defendant had moved to Riverside County, including that defendant told Deputy Hernandez he had moved to the trailer park, testimony from the on-site manager that defendant intended to stay at the trailer park for months, and testimony from other residents that he appeared to live in the trailer. Finally, defendant had a long history of failing to register. There was substantial

evidence presented to support that defendant failed to register as required under section 290.

Based on the foregoing, even if the prosecutor committed misconduct or the evidence was erroneously admitted to the jury, reversal is not required.

IV

PROSECUTORIAL MISCONDUCT

Defendant makes numerous arguments that the prosecutor committed misconduct. He also additionally appears to contend that the trial court committed misconduct and was biased against him. We set forth the standard for prosecutorial misconduct, *ante*.[3]

Defendant first addresses that the prosecutor committed misconduct by amending the original complaint to add two additional strike convictions after defendant entered a guilty plea.[4]

At a pretrial appearance, the People advised the trial court that defendant had two additional strikes, and a decision was being made whether to add the strikes. At the next appearance, the decision to add the strikes had not yet been made, and defendant wanted

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[3] We note that, although we have made every attempt to determine defendant's claims of prosecutorial misconduct and judicial misconduct, the opening brief is disorganized and extremely difficult to follow. Although we have reviewed the entire record, it is defendant's responsibility on appeal to establish error and make citations to the record to support such claims. (Cal. Rules of Court, Rule 8.204 (a)(1)(C).)

[4] In his reply brief, defendant claims he is not arguing that the individual instances of misconduct require reversal, but rather he is attempting to show a pattern of misconduct. However, it is axiomatic that, in order to show a pattern of misconduct, he must show that misconduct occurred.

to plead guilty to the charges as they stood. The People indicated they might want to still add the strikes, and the trial court accepted the guilty plea over the People's objection. At the next hearing, the People had amended the information to include the two additional strikes. The prosecutor explained it had been amended after recently finding out about actions by defendant in Washington State. According to the prosecutor, defendant had asked young girls to pull up their tops so he could photograph them. The trial court granted the request to amend the information. Defendant withdrew his guilty plea.

We do not think that the prosecutor's conduct in amending the information was somehow vindictive or improper. "'"[A] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct [because] the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." [Citation.]'" (*People v. Edwards* (1991) 54 Cal.3d 787, 828; see also *People v. Michaels* (2002) 28 Cal.4th 486, 514-515.)

The prosecutor was not prohibited from amending the information after defendant pled guilty. (*People v. Michaels, supra*, 28 Cal.4th at p. 513.) From the beginning, the prosecutor indicated she might amend the information due to other pending cases against defendant. She objected to the guilty plea. We cannot conclude that this amounted to prosecutorial misconduct.

Further, defendant cannot not show prejudice. The maximum possible sentence when he entered his guilty plea was seven years four months. The trial court struck the

prior convictions at sentencing, and he received an eight-year sentence. Defendant makes no concerted effort to show how he was prejudiced by the amendment. We reject his claim.

Defendant makes several other claims of prosecutorial misconduct, all of which occurred outside the presence of the jury, including that the prosecutor (1) sought to impeach defendant, if he testified, with a prior theft conviction from 1997 that defendant claims was too remote; (2) referred the trial court to cases it had not read during jury deliberations in an effort to extend the deliberations; (3) misstated to the trial court the proper response to jury questions and sought improper removal of a juror; (4) advised the trial court that a mistrial was unwarranted due to the fact the trial had taken three weeks when it only took one day; (5) misstated to the trial court that the jurors were having trouble with one of the jurors due to a "language issue"; (6) improperly argued in opposing the *Romero* motion that defendant was involved in domestic violence; (7) improperly brought up to the trial court an incident occurring in Washington State involving defendant taking pictures of minors; and (8) argued in opposition to the *Romero* motion that, if given less than a 25-years-to-life sentence, defendant would get out and resort to killing his next victim.

We need not address each of these instances individually. At no time did defendant object below to these instances on the ground of prosecutorial misconduct. "When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely

objection. Otherwise no claim is preserved for appeal." (*People v. Morales*, *supra*, 25 Cal.4th at pp. 43-44.)

Further, none of the above incidents occurred in front of the jury. Defendant has not attempted to show how he was prejudiced or how such incidents, occurring outside the presence of the jury, resulted in his receiving an unfair trial. Defendant cites no case authority and provides no argument as to how a prosecutor's actions *outside the jury's presence* results in the jury reaching an erroneous verdict.

In addition, defendant's prior conviction for theft and the incidents occurring in Washington were to be used to impeach defendant should he testify, which he never did. Any prejudice defendant claims occurred due to the argument by counsel in opposing his *Romero* motion is nonexistent, given that the trial court struck two of his prior convictions, for rape and oral copulation by force. As for his other claims, we simply cannot find that the prosecutor's arguments to the court deprived defendant of due process and a fair trial. (*People v. Davis*, *supra*, 46 Cal.4th at p. 612.)

Defendant makes one other claim that the prosecutor committed misconduct by failing to provide him with a transcript of a taped interview of Diana Brannigan. The prosecutor indicated that she had transcribed it but that the transcript was not complete. At another hearing, the prosecutor indicated she had not turned over the transcript because she was not sure of its accuracy.

We do not see how defendant was prejudiced by the failure to receive the transcript when he possessed the tape and knew of its contents. Further, the tape was

never played to the jury so the transcript was never introduced into evidence. This claim, as do defendant's others, fails to show prosecutorial misconduct.

In his reply brief, defendant concludes that he is not asking this court to find individual instances of prosecutorial misconduct, but to find that the prosecutor engaged in a "pattern unacceptable under professional and ethical standards of advocacy." As previously stated, the problem with defendant's argument is that he has failed to show that any prosecutorial misconduct occurred in this case. Defendant has completely failed to show that the prosecutor's actions — again, all of which occurred outside the presence of the jury — infected the *jury* in anyway. Defendant has failed to connect the dots as to how the prosecutor's arguments to the trial court infected his trial. Defendant continues to argue that the prosecutor invited the jury and court to speculate about his priors, including the Washington case, and that his next crime would be murder, but he provides absolutely no evidence that such arguments were made to the jury. We reject his claim of prosecutorial misconduct, whether it is based on individual instances of prosecutorial misconduct or a pattern of misconduct.

We note that in his opening brief, defendant appeared to be raising claims of judicial misconduct. However, in his reply brief, he claims that he only raised the issue to show how the pattern of judicial favoritism toward the prosecutor "reflected and encouraged overzealous prosecution." We cannot discern from the briefing what defendant seeks to accomplish by this argument. We have already rejected that the prosecutor committed misconduct. Defendant in fact rejects that he is making an

argument that the trial court's actions prejudiced him. We therefore decline to address this issue, as we have reviewed the record and find that trial court acted fairly and judiciously.

V

MIRANDA VIOLATION

Defendant contends that the trial court erred by denying his motion to suppress statements he made prior to being given *Miranda* warnings. The People contend that this court need not address the issue because his statement was not introduced at trial. Once again, defendant makes an unsubstantiated claim unsupported by the record.

A. *Additional Factual Background*

Defendant brought a written motion to suppress defendant's statements made to Remmers when he was stopped. At the hearing on the motion, defendant's counsel complained that defendant was clearly not free to leave when questioned by Remmers. According to defense counsel, Remmers told defendant that he was there to investigate defendant's failure to register. Defendant was not read his *Miranda* rights. Defendant was upset and crying. Defendant's counsel argued defendant was not told he was free to leave. Remmers questioned him for 10 minutes. Remmers then placed defendant under arrest and read him his *Miranda* rights. Defense counsel argued all statements made by defendant to Remmers should be suppressed.

The People stated that they were not sure if they were going to play the tape of the conversation. Nonetheless, the prosecutor argued that Remmers did not have his weapon drawn, and the other officers were not standing in close proximity.

An Evidence Code section 402 examination was conducted. Remmers arrived at the location where defendant had been stopped by Deputy Hernandez. Defendant was sitting in his truck with his two children, who were seven months old and two years old. When Remmers spoke with defendant, defendant remained in his truck holding his seven-month-old child, and his two-year-old child was sitting next to him. He was never asked to step away from the children. Remmers did not have his gun drawn, and defendant was not handcuffed. Remmers was dressed in plain clothes and did not have his gun showing. The other officers were standing by a patrol car at least a car length away. Remmers never threatened defendant or made any promises to him.

Remmers asked defendant when he had moved to Riverside and what his sex offender registration status was. Defendant told Remmers that he had moved three weeks prior with his fiancée and children to the Indian Oaks Trailer Ranch from Norwalk. He admitted he was required to register and had not. Defendant was aware of his duty to register. Remmers had checked records prior to arriving that showed defendant had been in California for some time and had not registered. Defendant was then arrested and given his *Miranda* rights.

The trial court ruled that this was merely an investigatory stop. Defendant was never ordered out of the truck and remained in his truck with his two small children. If

there was a contemplated arrest by Remmers, the children would not have been allowed to remain in the truck. No guns were exposed, and the questioning was only for 10 minutes. The motion to suppress was denied.

At trial, Deputy Hernandez testified, without objection, that defendant told him that he had been living at the Indian Oaks Trailer Ranch for "a few weeks." Deputy Hernandez said nothing about defendant admitting that he had failed to register as a sex offender.

During Remmers testimony, defendant renewed the motion to suppress motion. The trial court denied the motion. The prosecutor also stated that she was not going to question Remmers about the discussion to avoid the defendant from arguing the legal issue of his detention.

B. *Analysis*

"To protect the Fifth Amendment privilege against self-incrimination, a person undergoing a custodial interrogation must first be advised of his right to remain silent, to the presence of counsel, and to appointed counsel, if indigent. [Citation.] As long as the suspect knowingly and intelligently waives these rights, the police are free to interrogate him. [Citation.] However, if, at any point in the interview, the suspect invokes his rights, questioning must cease. [Citations.] Statements obtained in violation of these rules are inadmissible to prove guilt in a criminal case. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 535.)

"A judgment will not be reversed on grounds that evidence has been erroneously admitted unless 'there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion*. . . .' [Citation.] . . . *Miranda*-based claims are governed by this rule." (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854.) Thus, the defendant's *Miranda* objection at trial must have been made on the same grounds as those raised on appeal. (*People v. Hill* (1992) 3 Cal.4th 959, 982, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Visciotti* (1992) 2 Cal.4th 1, 54.)

The People contend in their respondent's brief that the statements defendant sought to suppress — the statements made to Remmers — were not introduced at trial. We have reviewed the record and agree that the statements made to Remmers by defendant were not introduced at trial. Defendant does not show otherwise. Defendant cannot show that his Fifth Amendment privilege against self-incrimination was violated if the statements were not introduced against him at trial. (See *Miranda*, *supra*, 384 U.S. at p. 444 ["prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"].)

In his reply brief, defendant states that he was also objecting to the statements made to Deputy Hernandez regarding defendant's failure to register and the fact defendant had been living at the trailer park for weeks. Deputy Hernandez testified that

when he contacted defendant, he told him he had been living at the Indian Oaks Trailer Ranch for "a few weeks." We find nowhere in the record that Deputy Hernandez testified that he told Remmers that defendant had failed to register.

This was not the basis of defendant's *Miranda* objection below and no attendant objection was made at the time of the testimony. In the lower court, defendant filed his motion to suppress his statements made to Remmers. The only evidence presented at the suppression hearing was from Remmers, and no mention of the statements made to Deputy Hernandez were brought forth and argued that they should be excluded. The trial court noted in ruling on the motion that it did not know what had transpired with Deputy Hernandez.

Defendant never objected to the statements made to Deputy Hernandez in the lower court as violating *Miranda*. Defendant in fact admitted in his opening brief that the trial court only addressed the statements made to Remmers. Only now does he contend that his motion addressed all statements made by defendant, including those to Deputy Hernandez. Since the record shows that defendant did not object to statements made by defendant to Deputy Hernandez in the lower court, the issue is not reviewable on appeal.

Nonetheless, even if we were to review his claim, we find the trial court did not error by finding that the entire stop of defendant was investigatory. As such, even if defendant had sought to exclude statements made by defendant to Deputy Hernandez, they would have been admissible.

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry, all agree, is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a "mixed question of law and fact". . . .' [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding '"basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .'"' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

The trial court found the entire stop to be investigatory. Here, defendant was initially stopped by Deputy Hernandez in order to investigate a domestic violence charge. At some point during this initial stop, defendant told Deputy Hernandez that he had been living at the trailer park for a few weeks. The record does not show whether this was in

response to questioning by Deputy Hernandez or whether defendant volunteered the information. Assuming Deputy Hernandez questioned defendant, there is no evidence Deputy Hernandez showed him a weapon. Further, defendant was allowed to remain in his truck with his children. Even if we were to review defendant's claim, we would find that the stop was purely investigatory, and no *Miranda* warnings were required.

Moreover, admission of the statement even if *Miranda* warnings were required does not require reversal. "When a statement obtained in violation of *Miranda* is erroneously admitted into evidence, the conviction may be affirmed if the error is harmless beyond a reasonable doubt." (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 363; see also *Chapman v. California* (1966) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Here, in addition to defendant's statement, Brannigan testified defendant had been living in his trailer since November 8, 2007. Several residents of the park testified it appeared defendant was living at the trailer park. We cannot conclude defendant's statements alone resulted in the finding of guilt by the jury. We accordingly reject his claim.

VI

INTRUSION INTO JURY DELIBERATIONS

Defendant contends that the trial court improperly intruded into jury deliberations in answering juror questions during deliberations and by inquiring regarding juror misconduct.

A. *Jury Questions and Responses*

Jury deliberations commenced on July 22, 2008. The first jury questions came the following day.

The first two questions from the jury were, "Do you by law must have a lease agreement to establish a residence? And would you consider a residence and a domicil[e] the same?" The trial court first indicated that it would answer that a lease agreement was not required to establish a residence, but defendant objected. The trial court reviewed case law, which indicated "residence" did not have to be defined for the jury. The trial court intended to respond that the jurors refer to Judicial Council of California Criminal Jury Instruction (CALCRIM) Nos. 200 and 1170, and defendant agreed. The prosecutor did not agree, arguing that the jury should be instructed that no lease agreement was required.

The trial court responded, "Read Jury Instructions #1170 & #200." After the jury resumed deliberations, the prosecutor brought forward several cases for the trial court that residence could be defined for the jurors. The trial court refused to give any further definition.

"Section 1138 provides that when, after it has begun deliberating, the jury 'desire[s] to be informed on any point of law arising in the case, . . . the information required must be given . . . .' [Citation.] This provision imposes on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 755.) "This does not mean the court must

always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] . . . But a court must . . . at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) We review the trial court's response to a jury question for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 985.)

Defendant did not object to the response and therefore waived the issue on appeal. (*People v. Payton* (1992) 3 Cal.4th 1050, 1068.) Furthermore, there was nothing erroneous regarding the response to the jurors. CALCRIM No. 1170, which appears in the record, is merely a definition of the crime of violating section 290. CALCRIM No. 200 provided in part, "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary everyday meanings."

Defendant complains an unredacted copy of CALCRIM No. 1170 was found in the jury room. However, there is no indication what was included in the unredacted copy or how it prejudiced him.

The jury then sent a statement, "Your Honor[,] at this point in time the jury is dead lock[ed], and can not [*sic*] come to a[n] accord with each other due to the fact of the evidence not being 100%." The trial court was "amazed" by the question and suggested bringing them in to read the reasonable doubt instruction again. Both parties agreed. However, the prosecutor then requested that the jurors be told that they did not have to have 100 percent belief in the evidence. Defendant objected. The trial court was inclined to advise the jurors that the law did not require the jurors to prove their case by 100 percent and to refer them back to the reasonable doubt instruction. Defendant requested that the jury just be referred to the instruction. The trial court was concerned this would not be enough to help them.

The trial court then advised the jurors, "The law does not require that the People prove their case by 100 percent. The law required, regarding the burden of proof[,] can be found at jury instruction 220." The trial court then reread CALCRIM Nos. 220 and 200 to the jurors.

There was nothing improper in the trial court's response. The standard of reasonable doubt does not require 100 percent certainty, and the trial court immediately referred the jurors to the instruction on reasonable doubt.

Two more questions were raised by the jurors regarding being deadlocked and a juror not deliberating, which will be discussed, *post*. After the jury went back into deliberations, they sent out another note and appeared to be deliberating. The note stated, "Need further interpretation of the Penal Code 290 with respect to 'moving'. Would that

[be] considered a change of address? [¶] Also request interpretation if the sex offender has to register within 5 days if to travel, visiting another jurisdiction but not actually live there." Defendant did not want the jurors to be advised to look at specific exhibits. The trial court felt the jurors needed more than a general response. The trial court noted, "It's a fine line, and I agree . . . that there's a lot of things that have gone on in this case that I'm sure are going to be appealed, and I don't know what's going to happen." The trial court intended to advise the jurors, "The jury should review the exhibits regarding notice to register and registration requirements, specifically exhibits 3, 4, and 6." It also intended to advise them, "The jury should review jury instructions 1170, 200 and Exhibit 6." It added that the jurors should look at all of the exhibits. The jury then returned its verdict.

We cannot conclude that the trial court abused its discretion by referring the jurors to these exhibits. Again, the trial court can respond to juror questions and in this instance only referred the jurors back to the already admitted exhibits.

"'[A] conviction will not be reversed for a violation of section 1138 unless prejudice is shown.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1027; see also *People v. Jennings* (1991) 53 Cal.3d 334, 384-385 [finding error based on violation of section 1138 harmless beyond a reasonable doubt]; but see *People v. Ainsworth* (1988) 45 Cal.3d 984, 1020 [applying state standard of review to find similar error harmless].)

Under either standard of error, we find no prejudice. Defendant argues in general terms that the responses by the trial court "compromised the vital sanctity of the jury's

deliberations." He also argues that the trial court went "too far." Defendant does not show that the responses made by the trial court were improper or misstated the law. We simply cannot find that the trial court abused its discretion in responding to the jury's questions. The court's responses were accurate and adequately responded to the jurors' questions. The exhibits referred to included the records of the prior convictions and the advisements given to the defendant. That evidence was already before the jury. We find there was no prejudice.

B. *Deadlocked Jury and Jury Misconduct Inquiry*

During deliberations, the jury then sent a note to the trial court that stated, "We the jury are hopelessly dead lock[ed] and can not [*sic*] reach a verdict. We exhausted our resources with no resolution. We feel that further deliberation will not resolve this matter."

The prosecutor felt there was juror misconduct because the jurors were not following the court's instructions. The prosecutor also indicated that she had found some case law to support removing jurors and replacing them with alternates. Defendant requested that the trial court inquire of the jurors but that it was clear they were deadlocked and the case should be over. Since it was almost 5:00 p.m., the prosecutor suggested that the trial court could read the suggested cases and call the jurors back in the morning. The trial court agreed, since it was the end of the day, to read the cases and call back the jurors the next day.

The following day, the trial court indicated that it had read the cases from the prosecutor, and found one case — *People v. Cleveland* (2001) 25 Cal.4th 466 — most helpful. Based on the research done by the trial court, it felt an investigation into juror misconduct (the failure to follow the instructions) was proper. Defendant disagreed that there was any indication from the jurors that one of them was not following the law. However, defendant did agree with the trial court asking the foreperson if all the jurors followed the law according to the jury instructions given. The trial court noted that it would have to be shown by a "demonstrable reality" that a juror was not following the instructions to find juror misconduct and remove the juror.

Before the trial court could bring the jurors in to inquire about being deadlocked, another note was sent which read as follows: "It is the opinion of the jury that a member of the jury is not following instructions. How shall the jury proceed?" The note was signed by juror Nos. 5, 6, 8, 11 and 12. It was not signed by the foreperson. The trial court recommended that each of these jurors be called in individually and questioned.

The trial court advised the jurors to stop deliberating. Juror No. 11 was called into the court. Juror No. 11 stated that Juror No. 3 was not following the instructions. Juror No. 11 stated the problem was in regard to whether the defendant resided in Riverside County.

The trial court asked Juror No. 11 how Juror No. 3 was not following the law. Juror No. 11 stated, "When all the jurors came in, we took an oath. Before we even took the oath, the D.A. asked us a question, Did we want her to prove this case 100 percent.

Each juror stated no. You also asked us, as jurors, to be open-minded and to only go by the jury instructions. [¶] This juror seems to take this element number 2 very personal. She is constantly stating she needs more information A, B, C, and everything is questioned. And it just seems very personal. Her own personal experiences she keeps bringing to the table instead of looking at the evidence that's in front of her, instead of following the instructions that you gave us."

Juror No. 6 was brought in and also said it was Juror No. 3 who was not following the instructions. Juror No. 6 stated, "I feel sorry for her because she's trying so hard, but in trying so hard she's looking at these words and trying to figure out what their meaning is. Like the word 'reside' and 'living' — what does that really mean? And so the evidence that we have is not enough. She wants more. [¶] If she had a document to show that he lived there, she could accept that he lives there, but just the testimonies of other people are not sufficient. If there's not a written document saying that he's leasing or renting — she can't accept it without this document. And . . . she needs to know more about the witnesses, like the lady next door, she needs to know what her occupation is."

Juror No. 5 was questioned and stated that Juror No. 3 was not following the instructions: "She's actually . . . making it . . . personal. Very angry. What else is she doing? Angry. She wants more evidence." Juror No. 5 also indicated Juror No. 3 said she had to "pray" about the decision and stated that the prosecutor had asked each of the prospective jurors "[i]f [the prosecutor] has to prove her case 100 percent. And we all

agreed that, no, she didn't. That was just it. [W]e just feel that one juror wants it to be proven 100 percent."

Juror No. 8 was questioned and also stated it was Juror No. 3 who was not following the instructions. Juror No. 8 indicated that Juror No. 3 wanted more evidence regarding residence and wanted a lease agreement. Juror No. 3 was focusing on the legal meaning, not the normal meaning, of "reside."

Juror No. 12 was questioned and also stated that Juror No. 3 was not following the instructions. Juror No. 12 stated, "I just feel like she's speculating on information we don't have. She's interrupting the other jurors when we're trying to speak, and . . . it appears she wants this case all 100 percent, wanting more information, wanting things that we won't be receiving." Juror No. 12 also commented that Juror No. 3 was very emotional.

Juror No. 3 was called into the courtroom. In response to whether she was participating in deliberations, she responded, "Yes, I am." She stated she was listening to the other jurors as to their comments and their views of the evidence. She also listened to their interpretations of the law. The trial court asked, "And do you have . . . a concern that the evidence does not prove the case 100 percent?" Juror No. 3 responded, "No. I don't have any concern about 100 percent, reasonable doubt." Juror No. 3 had no problems with the law as it was read in the case. Juror No. 3 had no problems with the facts and how they applied to the law. In response to whether her personal feelings were interfering with the deliberative process, she responded, "Absolutely not." She perceived

that the jurors were following the jury instructions and looking to the elements of the crime.

The prosecutor felt that Juror No. 3 should be excused for failing to follow the law as stated by five of the jurors and that an alternate should be seated. The prosecutor requested in the alternative to reopen closing arguments. Defendant argued against removing Juror No. 3.

The trial court felt that there had not been shown by a demonstrable reality that Juror No. 3 was refusing to follow the instructions, and therefore no misconduct had been shown. Juror No. 3 was concerned with the sufficiency of the evidence. The trial court refused to remove Juror No. 3. It intended to question the jury about being deadlocked. Defendant requested that a mistrial be declared.

"The need to protect the sanctity of jury deliberations . . . does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (*People v. Cleveland, supra*, 25 Cal.4th at p. 476.) "[A] trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (*Id*. at p. 485.)

"Although courts should promptly investigate allegations of juror misconduct 'to nip the problem in the bud' [citation], they have considerable discretion in determining how to conduct the investigation. 'The court's discretion in deciding whether to

discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 274.) "The decision whether to investigate possible juror bias, incompetence, or misconduct, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 434.)

Here, the jurors first expressed that they were deadlocked. The jury continued to deliberate while the trial court formulated a plan to respond. During this time, the jurors sent the second note that they believed that one of the jurors was not following the instructions. The trial court appropriately first addressed whether there was juror misconduct. Assuming misconduct was found and the juror was removed, deliberations would have started anew. (See *People v. Collins* (1976) 17 Cal.3d 687, 694.)

Here, the trial court properly inquired of the jurors who signed the note as to the reasons they felt Juror No. 3 was not following the court's instructions. The trial court controlled the responses. The trial court did not abuse its vast discretion in attempting to determine if misconduct occurred. (*People v. Prieto, supra,* 30 Cal.4th at p. 274.)

Once the trial court determined that there was no juror misconduct, which it appropriately addressed first, it considered the issue of whether the jury was deadlocked.

The trial court then inquired in front of the entire jury if the jury was deadlocked. Juror No. 10, the foreperson, did not believe that further deliberations would be helpful. The trial court noted for the record that it took the foreperson some time to answer and

asked if there was anything it could do to assist the jurors. Juror No. 10 denied that rereading any of the instructions or testimony would assist them. The trial court also noted that Juror No. 10 was very emotional. The trial court inquired, "Are you sure that there's nothing else that the Court can do to help you or help this jury?," and Juror No. 10 responded, "To be honest, this jury — not in the direction that it's going." The jury had taken only one vote, and it was 11 to 1.

Each juror was asked if a verdict could be reached with further deliberation. Eleven responded no, including Juror No. 3. Only Juror No. 1 felt a verdict could be reached. The trial court responded that it believed a verdict could be reached with further deliberation and ordered the jurors back the following morning. At a side bar conference, defendant indicated that Juror No. 1 did not appear to understand the question, and no one else was going to change their mind. The trial court was concerned that only one ballot had been taken and refused to inquire further of Juror No. 1. The jury then reached a verdict.

"It is settled that a court may inquire into the numerical division of the jury in a deadlock during the penalty phase, and that whether there is a 'reasonable probability' of agreement is a matter committed to the trial court's discretion. [Citations.] 'Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case.' [Citation.]" (*People v. Butler* (2009) 46 Cal.4th 847, 884-885.)

Contrary to defendant's claim, there is no indication that there was pressure on the holdout juror. The jurors were not told that they must reach a verdict or that they would be held until they reached a verdict. This case is unlike *People v. Crowley* (1950) 101 Cal.App.2d 71, 74, where the jury was told by the trial court that the case was simple and that a retrial would be expensive and burdensome. The jury here was merely advised by the trial court to continue deliberations without any further comment as to whether they were required to reach a verdict.

Based on the foregoing, there was no improper intrusion into the deliberative process and there was no coercion of the single holdout to reach a verdict.

VII

CUMULATIVE ERROR

Defendant argues that the "overzealous prosecution" and "overly passive adjudication" along with the other errors that occurred at trial cumulatively prejudiced him. (Capitalization omitted.) We disagree. We have either rejected defendant's claims of error or found any errors, assumed or not, to be not prejudicial on an individual basis. Assuming any error, and viewing any such errors as a whole, we conclude that they do not warrant reversal of the judgment. (*People v. Stitely, supra,* 35 Cal.4th at p. 560.)

VIII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.